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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL CARAVES,

Defendant and Appellant.

F057645

(Super. Ct. No. DF005885B)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Kathleen Woods Novoa, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, William K. Kim and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

Appellant Miguel Caraves stands convicted of receiving a stolen vehicle (Pen. Code, § 496d¹). Initially, in January 2005, the court placed appellant on three years' probation. As a condition of probation, the court, pursuant to section 1202.44, assessed a probation revocation restitution fine of \$200. Section 1202.44 provides, in relevant part, that such a fine "shall become effective upon revocation of probation"

In July 2006, the court ordered appellant's probation revoked, based on the probation officer's representation that appellant had violated probation by failing to report to the probation department within five days of his release from custody, and issued a bench warrant.

In February 2009, appellant admitted the allegation that he violated his probation. In March 2009, the court imposed a 16-month prison term; awarded appellant 246 days of presentence credit, consisting of, 164 days of actual time credit of and 82 days of conduct credit; and declared the section 1202.44 fine due and payable.

On appeal, appellant contends, and the People concede, the imposition of the section 1202.44 fine constituted an unconstitutional ex post facto punishment. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) In addition, as discussed in the "Conduct Credit" portion of the "Discussion" section below, we deem to be raised the contention that appellant is entitled to additional conduct credit under a recent amendment to section 4019. We will strike the section 1202.44 fine, and in all other respects affirm.

¹ All statutory references are to the Penal Code.

DISCUSSION

Section 1202.44 Fine

Section 1202.44 became effective on August 16, 2004. (Stats. 2004, ch. 223, §§ 3, 8.) Appellant apparently committed the instant offense in 2001.²

In *Johnson v. United States* (2000) 529 U.S. 694, the Supreme Court held that a postrevocation penalty relates to the defendant's original conviction, not any new conduct by the defendant which violates the terms of his supervised release. (*Id.* at pp. 700-701.) In reliance on *Johnson*, the court in *People v. Callejas* (2000) 85 Cal.App.4th 667, 678, concluded that imposition of a parole revocation restitution fine under section 1202.45 violated the constitutional prohibition against ex post facto laws where the underlying crime was committed prior to the enactment of that section. As the People concede, the reasoning of *Johnson* and *Callejas* applies equally to the imposition of the probation revocation restitution fine pursuant to section 1202.44, a provision similar to section 1202.45. Therefore, we will order the probation revocation restitution fine stricken.

Conduct Credit

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a).) In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 734, 939, fn. 3.)

² Appellant was initially charged with, inter alia, receiving stolen property in violation of section 496, subdivision (a). It was alleged the offense occurred in November 2001. That charge was later dismissed and the information was amended to allege the instant offense.

The court sentenced appellant in March 2009, and calculated appellant's conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to the benefit of the more generous conduct credit accrual provisions of the 2010 amendment to section 4019, we would deem raised, without additional briefing, the contention that prospective-only application of the amendment is contrary to the intent of the Legislature and violates equal protection principles. We deem these contentions raised here.

As this court explained in the recent case of *People v. Rodriguez* (2010) 183 Cal.App.4th 1, the 2010 amendment does not operate retroactively and does not violate the constitutional guarantee of equal protection of the laws. Appellant is, therefore, not entitled to additional conduct credit under that amendment.

DISPOSITION

The judgment is modified to provide that the \$200 section 1202.44 probation revocation restitution fine is stricken. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.